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No. _____

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

RENEE DuBOIS

DAVID JOHNSON
and
ZACHARY KINNEY
Petitioners

v.

CITY OF COLLEGE PARK
and
MIRIAM WOLF
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals of Maryland erred in approving a reapportionment plan which permits only registered voters to be counted in the apportionment base for determining the apportionment of Councilmanic Districts in the City of College Park?

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JURISDICTIONAL STATEMENT

The Petitioners herein seek review of the judgement of the Court of Appeals of Maryland dated and filed on July 19, 1982.

The jurisdiction of this Court to review the judgement by writ of certiorari is invoked pursuant to 28 U.S.C. Section 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any low which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

STATEMENT OF THE CASE

The Petitioners brought this action pursuant to Maryland Rule 209(a) for the named Petitioners and on behalf of all those students similary situated, seeking a declaration that the councilmanic districts of the City of College Park are malapportioned in violation of the Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America.

The case was initiated with the filing of a Bill of Compliant for Declaratory Relief alleging that the councilmanic districts of the City of College Park were unconstitutionally apportioned in that, if students were counted in determining the population of Districts Three and Five for purposes of apportionment, said Districts would be unconstitutionally disproportionate to the other districts, and, therefore, the votes of

students in those districts would be diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. It was stipulated that students in Districts Three and Five were intentionally not counted by the City of College Park in determining the size of these Districts; and further, it was stipulated that students in these Districts could vote in College Park elections if otherwise qualified pursuant to the College Park Code. It was likewise agreed that the named Petitioners are registered to vote and, in fact, voted in City elections held in November, 1975.

The City defended this action initially on the basis that the named Petitioners did not have standing to bring this action, alleging that they were not bona fide residents of the City of College Park.

The matter went to hearing on February 4, 1976, before Judge Joseph A. Mattingly.

At the hearing, evidence was adduced by the Respondents indicating that the named Petitioners were not domiciliaries of the City of College Park, using the classic tests of situs of drivers' licenses, tax returns, and the like and, after Memoranda of Law were filed, the Court submitted a Memorandum Opinion dismissing the Petitioner's claim for lack of standing on the basis that they were not domiciliaries of the City of College Park.

The Petitioners appealed the dismissal to the Court of Special Appeals and the Court of Appeals, on its own Motion, filed a Writ of Certiorari to the Court of Special Appeals. After the filing of briefs and oral argument, the Court of Appeals reversed the findings of the lower court on the issue of the standing of the Petitioners without reaching any decision on the merits of the Petitioners' claim. After mandate, the case

was reargued before Judge Mattingly on October 6, 1977.

On the merits, the City, while conceding that, if the students in Districts Three and Five were counted, those voting Districts would be malapportioned, argued that the City had the right to exclude those students in the on-campus districts (i.e, Districts Three and Five) because they were either transients, short-term residents or nonresidents. The Petitioners argued that one could not reasonably distinguish between those students on-campus and those students off-campus. The City argued that there can be great fluctuations of the population of students on-campus causing a constant need to reevaluate the boundaries of the various councilmanic districts. Additionally, the City argued that the number of on-campus students who are, in fact, bona fide residents of Prince George's County is virtually negligible.

Petitioners argued that if you exclude the on-campus students but count the off-campus students, which it is agreed occurs, that you then cannot logically and constitutionally differentiate between the two classes. Petitioners further argued that the question of bona fide residency would have been decided when a student registered to vote, which any student has the right to do and that collateral attack on such qualifications was improper. On the issue of short-term residency, Petitioners argued that the authorities have held that certain people cannot be excluded from the population base for determining apportionment as a result of the nature of their employment.

The Court again requested Memoranda of Law and, after submission, the Court passed a Memorandum Opinion, dated November 1, 1977, which called for a reapportionment of the City of College Park, but indicated that the

City's only requirement was to reapportion Districts Three and Five on the basis of those students who, in fact, were registered to vote and not based upon the actual population of those Districts.

The City of College Park, pursuant to the Circuit Court's Memorandum Opinion and Order of November 15, 1977, submitted a plan in which the apportionment base was to be determined by including only registered voters from districts heavily populated by students but utilizing federal census data for the remainder of the population. The Court of Appeals held this plan unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment. The Court decided that using different standards to count students in different districts, the City established impermissible classifications without substantial justification.

As the result of this ruling, the

Defendant has submitted two alternative plans. Plan A establishes an apportionment base determined on the basis of a census, which would include only those residents of the City who can prove that they have an intention to remain in the City for an indefinite period of time. The City sought penalties for failure to respond to the questionnaire or for untruthful responses, of up to five hundred dollars or imprisonment. However, the Circuit Court found the questionnaire "both intrusive and obnoxious." The Court, however, approved Plan B. This alternative utilizes the list of registered voters as the apportionment base.

The Petitioners appealed and the Court of Appeals, issued a writ of certiorari. The Court of Appeals affirmed the judgement of the Circuit Court, thereby approving Plan B.

ARGUMENT

It is well settled that population is both "the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." Reynolds v. Sims, 377 U.S. 533, 567, 568 (1964). While numerous judicial opinions have utilized imprecise and undefined terms, such as citizens, citizen population, voters, qualified voters or registered voters, a brief consideration of the history of the "one man-one vote" principle leaves no doubt that total population must be the underpinning of any permissible apportionment plan.

The one man-one vote principle is grounded on the provision in the Constitution, Article I, Section 2, that representatives be chosen "by the People of the several States" and should be "apportioned among the several States . . . according to their respective numbers." This has

been construed to mean that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

The aforementioned constitutional provision was the essence of "the Great Compromise" of the Constitutional Convention of 1787. The question of how the legislature should be elected formed the most severe controversy of the Convention. The Articles of Confederation had established a loosely bound conglomeration of States, without an independent executive or judicial branch and with a Congress consisting of a single house. Each State, without regard to population or size, had one vote in this legislature. Many of the delegates to the Convention argued for a legislature elected by the people. In support of this position, James Madison stated that "if the

power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all."1/ Delegate James Wilson said that "equal numbers of people ought to have an equal number of representatives . . ." and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."2/

Of course, the Compromise was that the legislature consist of two houses; one in which the States were to be represented, and another in which people were to be represented.

1/ The Records of the Federal Convention of 1787 (Farrand Edition 1911) at 472.

2/ Id., at 180.

As the Supreme Court has stated:

> The debates at the Convention make at least one fact abundantly clear; that when the delegates agreed that the House should represent "people" they intended that in allocating congressman the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmond Randolph's proposal for a periodic census to ensure "fair representation of the people." an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives." (footnotes omitted)

Wesberry v. Sanders, supra, at 13, 14.

The "one person-one vote" principle, therefore, clearly requires that any constitutionally permissible apportionment plan must reflect substantial equality in districts such that the weight of potential votes are not impaired, debased or diluted. Accordingly, where "population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of

the State's citizens to cast an effective and adequately weighed vote would be unconstitutionally impaired." Reynolds v. Sims, supra, at 581.

It is the contention of the City that the adoption of the plan furthers its interest in eliminating from the apportionment base non-residents and transients who have little or no interest in the affairs of the City. It further argues that neither plan intentionally or otherwise discriminates against any group.

In support of its position that registered voters constitute a permissible apportionment base, the City places heavy reliance on Burns v. Richardson, 384 U.S. 73 (1966) and Martin v. Venables, 401 F. Supp. 611 (D. Conn, 1975). In Burns the Supreme Court did, in fact, approve registered voter lists as a permissible apportionment base. However, the City ignores

the basis under which the plan was approved. First, the Court stated that the use of a registered voter basis presents problems in that such criteria depends on "the extent of political activity of those eligible to register and vote," Burns v. Richardson, supra, at 92. As such, it was found to be "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment." Further, the Court found problems in fluctuations in these lists caused by fortuitous factors. For these reasons, the Court propounded a limitation on the use of a registered voter base. Such base may be used only when it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a

permissible population base." (Emphasis supplied.) Burns, supra, at 93.

The following statistics provided by the City of College Park clearly indicate that the use of a registered voter base would produce a distribution of legislators substantially different from that which would have resulted from the use of a permissible population base.

District	Registered Voters (1975)	Population Base Census (1970)	Students excluded	Total Population
1	697	2214		2214
2	454	1753		1753
3	449	2031	3812	5843
4	431	2442		2442
5	580	2271	4635	6906
6	284	1949		1949
7	482	2098		2098
8	390	2759		2759
TOTALS	3817	17,517	3447	25,964

Accordingly, the Petitioners respectfully submit that the use of a registered voter base does not produce substantially the same results as would a proper

population base and is, therefore, constitutionally impermissible.

Moreover, an equally important limitation has been recognized concerning apportionment plans in general and voter registration apportionment in particular. An apportionment plan is constitutionally impermissible where it is designed to or operates to minimize or cancel out the voting strength of racial or political elements of the voting population. Burns v. Richardson, supra.

Although the City of College Park asserts that the latest plans are neither designed nor intended to operate to dilute the voting power of on-campus students, this assertion must be considered in light of the City's previous ongoing efforts to do just that.

The motivation of the City is reflected in the record as early as June, 1967.

At a City Council meeting, a proposed Redistricting Resolution (67-R-3) was discussed. "Councilman Payne felt that college towns having a large resident student population in proportion to their total population would constitute an exception to the Attorney General's Opinion which permits the Bureau of the Census to enumerate resident students, living on campus, in their college towns. He further felt that including resident students in the total population would cause insufficient representation of year-round residents who pay taxes to the City and are concerned with its plan and problems. . . . Councilman Osborn spoke in favor of adoption of the Redistricting Plan, noting that University students are peripheral to the City's consideration regarding representation for the majority of residents . . . . The motion for adoption was then passed by

unanimous vote."

This debate on the issue clearly indicated the City's intent. It seeks to maximize the voting strength of non-students at the expense of and to the detriment of the students.

Further confirmation of the City's aims exists by virtue of the various plans submitted by the City. At first, the City attempted to simply ignore students as valid members of the apportionment base, using federal census data from which it subtracted the numbers of students living on campus. Next, the City attempted to utilize census data for all districts except those districts that had substantial student population. For those two districts only registered voters were to be counted in the apportionment base. Finally, the City, believing that a registered voter base might very well serve its

purposes, now seeks to establish the same criteria as nondiscriminatory and as blind to the nature and characteristics of the population.

The City's apparent rationale for its desire to minimize the voting power of students reflects their apparent concern that since students are assumed to have different interests in the affairs of the City, they would be inclined to vote contrary to the wishes of the majority non-student members of the community. The Supreme Court refers to this practice as "fencing out." The Court has stated that "fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "(T)he exercise of rights so vital to the maintenance of democratic institutions . . . cannot constitutionally be obliterated because of a fear of the political views of a particular

group of bona fide residents . . . ." (Citations omitted). Carrington v. Rush, 380 U.S. 89, 94 (1965).

Furthermore, the good faith of the City must be considered. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Supreme Court held that limited population variances are constitutionally permissible only if they are unavoidable despite a good faith effort to achieve absolute equality or if substantial justification is shown. In this case, the City's lack of good faith is clearly evident. When it fit their purposes, use of the federal census minus students was deemed appropriate. When that did not meet constitutional muster, a combination of the census and a registered voter requirement for students only was adopted. When that was found to be constitutionally inadequate, the latest means to the same end was adopted. Further, the

Court in Kirkpatrick, supra, found insufficient justification in such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the state, the high proportion of military personnel, college students, and other non-voters in some districts, or the political realities of legislative interplay. For those reasons, the Petitioner's respectfully suggest that the submitted reapportionment plan, adopted without good faith or satisfactory justification, are violative of the one man-one vote principle and, therefore, are unconstitutional.

Finally, it must be remembered that in deciding apportionment cases, the fundamental nature and importance of the vote in a democratic society cannot be overemphasized. It cannot be disputed that "the fundamental

principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." Reynolds v. Sims, supra, at 560-61. It is clear that a citizen has a constitutionally protected right to be represented and to participate in elections on an equal basis with others in the jurisdiction. The impairment of the constitutionally protected right to be represented and the right to vote "touches a sensitive and important area of human rights" and "involves one of the basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be

carefully and meticulously scrutinized." Reynolds v. Sims, supra, at 561-62.

In the instant case, an important question of federal law has been decided in a way in conflict with precedents established by the Supreme Court.

Accordingly, the Petitioners respectfully submit that the Plans offered by the City of College Park are unconstitutional attempts to dilute and debase the right to vote of a significant portion of the community. For these reasons, a writ of certiorari must issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed, by first class mail, postage prepaid, this 18th day of October, 1982, to Morris Topf, Attorney of Record for the Respondent, at Topf & Zell, 7735 Old Georgetown Road, Suite 530, Bethesda, Maryland 20014.

David K Nisbett

DAVID K. NISBETT

280 Md. 525, 375 A2d 1098

Renee DuBOIS et al.

v.

CITY OF COLLEGE PARK et al.

No. 135.

Court of Appeals of Maryland.

July 1, 1977.

ELDRIDGE, Judge.

This case presents the question of whether an action for declaratory judgment instituted by three registered voters of the City of College Park, seeking a declaration that the councilmanic districts of the city were unconstitutionally apportioned, was properly dismissed on the ground that the plaintiffs were not "bona fide residents of College Park" and therefore lacked standing to maintain the action.

The action was brought in the Circuit Court for Prince George's County. It was alleged that the plaintiffs, Renee Dubois and David Johnson, are students at the University of Maryland, residents of College Park, and registered to vote in city elections pursuant to the city charter. Later, Zachary Kinney, who was also alleged to be a student at the University of Maryland, a resident of College Park and a

registered voter of the city, was added as a party plaintiff. The plaintiffs claimed that the 1970 College Park census shows that the present councilmanic districts, established in 1967, are unequally apportioned and that the city, although having had an adequate opportunity to so so, has failed to reapportion the districts. It was alleged that, as a result of this malapportionment, the votes of the plaintiffs and those similarly situated are debased and they are deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The action was brought by the plaintiffs in their own behalf and on behalf of all those University of Maryland students similarly situated. The basis of the plaintiffs' complaint, as developed at trial, is that the population figures upon which the councilmanic districts are

apportioned exclude students residing on the campus of the University of Maryland with the result that the two "student" districts contain two to three times the population of the "non-student" districts.

The City of College Park, while contending that the districts are constitutionally apportioned on the basis of population figures including only bona fide residents of College Park, argued primarily that the plaintiffs did not have standing to maintain the action and were not proper representatives of the class which they purported to represent. Although the city did not attempt to controvert the allegation that the plaintiffs were duly registered voters of the City of College Park, it did present evidence, over the plaintiffs' objections, that the plaintiffs actually resided in areas other than College Park and therefore should not have been allowed to register as voters of

College Park.

At the conclusion of the trial and submission of legal memoranda, the trial court dismissed the action for lack of standing. The court reasoned that, under the criteria set forth in Bainum v. Kalen, 272 Md. 490, 325 A.2d 392 (1974), none of the plaintiffs were actually domiciled in College Park and therefore were not injured by the alleged malapportionment. Additionally, the court found that although two of the plaintiffs, Kinney and Johnson, lived in districts which, "if their contentions prevail, are underrepresented," the third plaintiff, Renee DuBois, lived in a district which was overrepresented. Therefore, the court found that even if Renee DuBois were domiciled in College Park, she should not be injured by the apportionment scheme and would not have standing to challenge the city's districting. Finally, the court held that

the suit could not be maintained as a class action because the plaintiffs, as nonresidents, were not members of the class they purported to represent: those students of the University of Maryland who are residents of College Park and eligible to vote in city elections. The circuit court did not consider the merits of the case, i.e., whether the districts were malapportioned.

The plaintiffs took an appeal to the Court of Special Appeals, and this Court issued a writ of certiorari to review the case prior to any decision by the Court of Special Appeals.

The plaintiffs contend that the fact that they are duly registered to vote in city elections pursuant to the College Park charter is sufficient to confer standing. They contend that the city cannot challenge their status as qualified voters in this proceeding by introducing evidence

that they are not residents of College Park when the city has, in accordance with the procedures set forth in the city charter, registered them as voters. Because standing in an action challenging the constitutionality of apportionment of voting districts is premised upon the plaintiffs' status as registered voters, and because the city did not deny, but in fact admitted, that the plaintiffs are registered voters, the plaintiffs argue that the circuit court should not have gone behind the plaintiffs' status as voters. It is argued that a court must find that, at this time, the plaintiffs have standing to challenge the constitutionality of the city's apportionment scheme. We agree.

In Baker v. Carr, 369 U.S. 186, 204-208, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), in determining whether voters have standing to challenge the constitutionality of apportionment of state legislative

districts, the Supreme Court stated that the question of standing depends upon whether the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Relying upon its prior cases, the Court held that "voters" who reside in allegedly malapportioned legislative districts sustain a "legally cognizable injury" and therefore have standing to maintain an action challenging the apportionment scheme. In the instant case, the city does not deny that the plaintiffs are registered voters of the City of College Park. As far as the record discloses, the city never instituted proceedings to have the plaintiffs' names removed from the registration lists, and the order in this case does not, and

indeed cannot, affect the status of the plaintiffs as eligible voters. The plaintiffs, therefore, are still registered "voters," eligible to participate in College Park elections and thus, in view of Baker v. Carr, supra, would appear to have standing to maintain this action.

Moreover, the city charter provides procedures for the removal from the registration lists of those voters who were either improperly registered or who subsequently become ineligible. Although the city has not affirmatively sought to have the plaintiffs adjudicated as ineligible to vote, it in essence argues that the plaintiffs are not eligible to vote because they do not meet the residency requirement of Section 14 of the City of College Park Charter. However, our prior cases indicate that where a statutory remedy is available to challenge the qualifications of voters on the registration

lists, that statutory remedy is the exclusive method for challenging the qualifications of registered voters. The registration lists, in the absence of allegations of fraud on the part of election officials, are conclusive evidence of the qualifications of voters, and the qualifications of voters may not be challenged in collateral proceedings. Lee v. Sec. of State & Mahoney, 251 Md. 134, 246 A.2d 562 (1968); Moore v. Bay, 149 Md, 286, 292-295, 131 A. 459 (1925).

In Lee v. Sec. of State & Mahoney, supra, the plaintiff challenged the right of a candidate to run in a general election as an independent. The challenge was based upon the contention that the Board of Supervisors of Elections had improperly reopened the voter registration books, during which time the candidate changed his party affiliation from Democrat to "decline." To be eligible to run as an

independent, the candidate must be registered as a "decline." This Court agreed that the Board, because of a misinterpretation of the election laws, had improperly reopened the registration books and allowed the candidate to change his party affiliation. However, the Court refused to declare the candidate ineligible despite the improper voter registration and affirmed the trial court's action dismissing the voter's challenge. The Court noted that the election code set forth administrative and judicial procedures by which the voter registration lists could be challenged and that the plaintiff had failed to follow these procedures. The Court held that the statutory procedures provided the exclusive remedy for the correction of the voter registration lists. Additionally, the plaintiff argued that the statutory remedy need not be followed since the purpose of the challenge was not to

correct the voter registration lists but rather to have the candidate declared ineligible to run as an independent. In rejecting this argument, the Court pointed out that the eligibility of the candidate to run as an independent depended upon his status as a registered "independent" voter, and that this could be raised only pursuant to the statutory procedures, 251 Md. at 141, 246 A.2d 562.

In Moore v. Bay, supra, two unsuccessful candidates in a municipal election challenged the validity of that election on the ground that some registered voters participating in the election did not possess all of the qualifications required by the city charter and therefore were not legally qualified to vote. After stating that the validity of the election turned upon the question of the effect to be given to the registration lists, this Court held that the election was valid because it was

the intent of the election laws "to make the final registration lists of voters conclusive evidence of those entitled to vote at the ensuing municipal election." Moore v. Bay, supra, 149 Md. at 296, 131 A, at 463. In reaching this conclusion, the Court noted that the local election law, which incorporated by reference consistent provisions of the state election laws, provided a comprehensive plan for the maintenance of registration lists. Thus, the local election law required that the city clerk enter on the registration lists only those applicants who satisfied the clerk by proof, under oath, that they met the qualifications of voters set forth in the city charter. The registration lists so compiled by the clerk were then to be reviewed by city officials and "any person (who) should feel himself aggrieved by the action of the clerk in registering . . . . the name of any person" could

obtain a hearing before the city council to contest the registration. An appeal from the determination of the city council could be taken to the circuit court. Additionally, the local law provided that the penalties prescribed by the general election laws should apply to all municipal elections. Id at 291, 294, 131 A. 459. This Court concluded that these were sufficient procedures to insure the integrity of the registration lists, and that the election laws evidenced an intent that the registration lists, compiled according to these procedures, should be conclusive evidence of qualified voters of the city.

The qualifications for voters of the City of College Park, and the procedures for registering voters for city elections are found in Sections 12 through 17(A) of of the city charter. These procedures are similar to those involved in Moore v. Bay, supra. Any person who is entitled to

register as a voter of the State of Maryland under the general election laws and who "shall have his actual residence in the City of College Park, in the sense that he had no other residence elsewhere, for the period of ninety (90) days next preceding a municipal election," is entitled to register if he satisfies the registering officer of these facts. Additionally, applicants who are registered to vote elsewhere in the State are required to file an affidavit affirming, inter alia, their intent to be members of the College Park community Section 14 of the charter. Persons registered pursuant to these provisions "shall be qualified voters of the City of College Park," Section 12 of the charter. Additionally, Section 15 of the College Park Charter provides that "(t)he proceedings for the registration of voters and the maintenance of registration lists . . . . shall conform as nearly as may be possible

to the proceedings for the registration of voters and the maintenance of registration lists under the general election laws of this state." Under a provision of the state general election law, Maryland Code (1957, 1976 Repl. Vol.), Art. 33, Section 3-16, which is made applicable to College Park elections by virtue of Section 15 of the city charter, any voter may file with the proper election officials "objections to the registration of any person whom such voter has reason to believe is not eligible to vote." Notice must be sent tothe challenged voter, and a hearing must be held on the challenge by the election officials, with the presumption being that the voter is properly registered, Section 3-16(c), (d).[1] An appeal

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1. "(a) Who may file challenge or application for correction of

may be taken from any action by the officials to the circuit court, Section 3-21. Additionally, election officials are to remove from the registration lists the names of those voters whom they have reason to believe have moved from the election district after proper notice to the voter, Section 3-17.

As in Moore v. Bay, supra, the provisions found in the College Park Charter, as well as those provisions of the general election laws made applicable to College Park elections, provide sufficient

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list; when and where filed. Any voter may file with the board or with the board of registry objections to the registration of of any person whom such voter has reason to believe is not eligible to vote, or a request for the addition of any person whose name

has been erroneously omitted or dropped from the registration list of any such percinct registration list or a challenge of the right to vote of a person named on such list may be made by any qualified voter at the office of the Board on or before the Tuesday, sixteen weeks preceding any primary election.

"(b) Manner of making application or challenge. Such applications or challenges shall be made in the form provided by subsection (e) of this section and the forms shall be provided by the board for that purpose. The voter shall state thereon, under oath and of his own personal knowledge, the reason for

the application or challenge. Thereafter the voter so applying or challenging shall be required to appear in person at the time of the hearing on the application or challenge as provided for in subsection (d) of this section and for wilful failure to so appear shall be subject to the penalties provided for in Section 24-27 of this article.

"(c) Notice; voter may appear in person or by counsel. Persons whose right to register has been challenged and persons whose names are alleged to have been erroneously omitted or dropped from the registration lists shall be given written notice, sent by mail, addressed to the voter at the last address

given on his registration form. Any voter so notified may appear in person or by counsel.

"(d) Hearing and action of board on applications and challenges. The board of registry shall sit for the purpose of hearing applications for changes in such registration lists, or challenges of the right to vote on such lists. They shall meet on the Tuesday fourteen weeks before an election at such hours as the board may designate. If all such applications or challenges be not determined on that day, they shall sit during the same hours on succeeding days until all cases are heard and decided. If it is not possible to hear all such cases within two days,

the board may appoint one or more boards of registry, each consisting of two members of opposite political parties, to aid in hearing such applications or challenges at a rate of compensation fixed as provided in Section 2-6 of this article. At the request of either party, the board shall issue subpoenas to witnesses to appear at such hearings, who shall be sworn and examined. All cases shall be decided immediately after hearing. No voter as to whom an application or a challenge has been made shall be removed from the registration lists unless the application or challenge is substantiated by

affirmative proof. In the absence of such proof, the presumption shall be that the voter as to whom the application or challenge was made is properly registered. If the board is satisfied that the person so challenged, omitted or dropped from the registration lists has actually moved to another precinct and is presently residing within that other precinct, the board may transfer that person to the registration list of the precinct in which he presently resides.

"(e) Form of challenge. Objections to the registration of any person shall be made on a form prescribed

safeguards to insure that only qualified voters appear on the registration lists, and to demonstrate the intent of the election laws that the registration lists be deemed conclusive evidence that those who are registered are qualified voters. Moreover, a specific statutory procedure has been provided for correction of the registration lists. Generally, where a special statutory remedy is provided, that remedy is usually deemed exclusive, and "the litigant must adopt that (remedy) and must not by-pass the administrative body or official, by pursuing other remedies." Schneider v. Pullen, 198 Md. 64, 68, 81 A2d 226, 228 (1951); accord,

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by the State Administrative Board of Election Laws."

Soley v. St. Comm'n on Human Rel., 277 Md. 521, 526, 356 A.2d 254 (1976); Agrarian, Inc. v. Zoning Inspector, 262 Md. 329, 332, 277 A.2d 591 (1971); Lee v. Sec. of State & Mahoney, supra. If it is believed that the plaintiffs are not qualified voters and should be removed from the voter registration lists, the procedures set forth in the election laws should be followed. The city cannot, by merely moving to dismiss for lack of standing in this proceeding, contest the fact that those registered according to the city charter are not qualified voters. See Lee v. Sec. of State & Mahoney, supra, 251 Md. at 141-142, 246 A.2d 562. We hold, therefore, that the plaintiffs, as registered voters, having standing to maintain the present action.

(8,9) The trial court also dismissed the action as to Renee DuBois on the

alternative ground that, as a resident of a councilmanic district which was "overrepresented," she had sustained no injury and therefore lacked standing to maintain this action. However, in view of Swann v. Adams, 385 U.S. 440, 443, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967), where the Supreme Court held that residents of a legislative district which received consitutional treatment under a redistricting plan had standing to maintain an appeal, Ms. DuBois would appear to have standing to maintain this action. Moreover, Art III, Section 5 of the Maryland Constitution, although not applicable to municipal legislative bodies, does reflect a State policy that any registered voter has a sufficient interest in the apportionment of electoral districts to challenge the constitutionality of a reapportionment scheme. Article

III, Section 5, expressly authorizes "any registered voter" to petition this Court to review the legislative districting plan for the General Assembly of Maryland. We therefore hold that Renee DuBois, as a registered voter of College Park, has a sufficient interest in the apportionment of that city's councilmanic districts to have standing to maintain this action.

(10) Finally, the trial court dismissed the class action on the ground that since the plaintiffs were not residents of the City of College Park they were not proper representatives of the class of persons whom they purported to represent. That class is composed of persons who are inter alia, residents of College Park and qualified to vote in all city elections. It follows from the fact that because the plaintiffs are registered voters of the City of

College Park, they are, for voting purposes, residents of the City of College Park. Therefore, we hold that the plaintiffs are proper representatives of the class which they purport to represent.

Because we hold that the trial court erred in dismissing this action, both as to the plaintiffs individually and as to the class action, we will remand this case to the Circuit Court for Prince George's County for consideration of the merits. We wish to emphasize that our holding in this case is limited to the question of whether the trial court, in this action, properly considered evidence as to the plaintiffs' status as residents of the City of College Park where their status as registered voters had not been challenged in a proper proceeding. We express no

opinion as to whether the plaintiffs are domiciled in College Park, and nothing contained herein should prejudice the rights of any parties in any proceeding in which the plaintiffs' registration in properly challenged.

JUDGMENT REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.

286 Md. 677, 410 A2d 577

Renee DuBOIS et al.

CITY OF COLLEGE PARK et al.

No. 139.

Court of Appeals of Maryland.

Jan. 28, 1980.

ELDRIDGE, Judge.

The largest campus of the University of Maryland is located in the City of College Park in Prince George's County, Maryland. Pursuant to a court order to reapportion its councilmanic districts, the City of College Park adopted a revised apportionment plan that excluded from its population apportionment base a large segment of students who lived in the University's dormitories. The issue before us is whether the circumstances of this case, violated the equal protection of the laws, and particularly the "one person one vote" principle of Baker v. Carr, 369 U.S. 136, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and their progeny.

The City of College Park is divided into eight councilmanic districts, each

of which electsone councilman to the City Council. The College Park campus of the University of Maryland is largely contained in parts of the third and fifth districts-often referred to as the "student" district. All dormitories are within the third and fifth districts. On the other hand, some fraternity and sorority houses, in which students also reside, are located in the second district.

In connection with its apportionment plan adopted in 1967, the City of College Park had to determine a population apportionment base, from which would be calculated the equal number of persons that would be included in each of its eight districts. The City arrived at its apportionment base by subtracting from its total

federal census population, which included all students physically residing in the City of College Park, those students who physically resided in dormitory facilities at the University.[1]

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1. Although all parties consistently refer to the excluded students as "on-campus" students and other students as "off-campus" students, it is not entirely clear what was meant by those terms. It appears that the phrase "on-campus" students refers to those students who live in dormitory facilities situated on property located within the actual physical boundaries of the University. All "on-campus" students

After the 1970 federal census was conducted, the City established a reapportionment committee. Although the reapportionment committee. Although the reapportionment committee developed several different reapportionment plans, none was adopted by the City, and it continued to use the apportionment plan of 1967.

In October 1975, three students began the instant proceedings by filing a class action in the Circuit Court for Prince George's County, alleging that the 1970 census showed the councilmanic districts to be unequally apportioned. The plaintiffs claimed that as a result of this malapportionment, the votes of the plaintiff class were unconstitutionally diluted. The named plaintiffs, Renee DuBois, David Johnson and Zachary Kinney, were alleged to be

students of the City of College Park, and registered to vote in City elections. One of the plaintiffs lived in a dormitory in the fifth district, one lived in a fraternity house in the third district, and one lived in a sorority house in the second district. The class represented by the named plaintiffs was defined as those students at the University of Maryland who were residents of the City of College Park and qualified to vote in all City elections.

As developed at trial, the basis of the plaintiffs' claim was that on-campus students were excluded from the apportionment figure which was used to determine the size of each councilmanic district of the City. As a result, according to the plaintiffs, their individual votes were diluted because the two councilmanic districts that include

the University of Maryland campus contained two or three times the population of the other six districts.

According to the evidence produced at the trial, the total population of College Park, as determined by the 1970 federal census, was 26, 156, which included the students who lived within the University's physical boundaries within the third and fifth districts, as well as students who lived elsewhere within the City. However, after interpolating the 1970 census figures into the eight districts as they were constituted under the 1967 apportionment plan, the City calculated that its new apportionment base would only be 17,517. Consistent with the method that it employed with the 1967 plan, the new apportionment base was arrived at by excluding from the 1970 census total population the

approximately 8,000 students, as determined by numbers supplied by University of Maryland officials, who resided in dormitories within the physical boundaries of the University.[2] The Mayor stated,

> 2. It is unclear whether this 8,000 student figure included students who resided in fraternity or sorority houses located in the third district, or whether is included students who resided in private residences in the third and fifth districts. It is clear that the 8,000 figure did not embrace any students who resided in districts other than the third or fifth districts. Therefore, the 8,000 figure did not include those students who resided in the fraternity and

sorority houses in the second district.

There is, however, some indication in the record that the 8,000 figure included only students who resided in the dormitories, which are located only in the third and fifth districts. Thus, there is an inference that students who lived in the fraternities and sororities in the third district and private residences in the third and fifth districts were not included in the 8,000 figure and that, therefore, these students were included by the City in the population base for the third and fifth districts.

would therefore be in the third and fifth districts. It is not completely clear whether the term "on-campus" also includes those residing in fraternities or sororities in the third district. The term "off-campus" students appears to refer to students who live in private residences or apartments, presumably including private residences in the third and fifth districts, and not on property physically located within the University's boundaries. In addition, all students living outside of the third and fifth districts are considered "off-campus" students. Thus, a student living in one of the fraternity or sorority houses located in the second district

would be deemed an "off-campus" student, just as if he lived in private housing. For the purposes of this opinion, we will accept what appears to be the parties' definitions of these terms. Therefore, "on-campus" students will refer to students who live in University residence facilities located within the boundaries of the University, which places those students in the third or fifth district. Off-campus" students will refer to students who live in all other districts within the City, including those who live in fraternities and sororities in the second district.

however, that the apportionment base of 17,517 included all students who resided in districts other than the third and fifth, and this fact was reiterated by counsel for the City at a hearing before the circuit court.

Based upon the 17,517 population figure, a perfectly apportioned plan would have had 2,190 persons in each district. All parties agreed, however, that if the students who resided within the physical limits of the University should have been included in the apportionment base, then the City's districts, even if changed to reflect 1970 population figures, would be malapportioned. If the 3.812 students living in University residence facilities in the third district and the 4,635 students living in University residences in the fifth district were added to

the population already included in these districts under the 1967 plan, as adjusted for the 1970 census, then the total population within these districts would be 5,843 and 6,906 respectively. These figures are far in excess of the 2,190 persons who would be in each of the other districts.

At the close of the trial, the circuit court concluded that none of the named plaintiffs was domiciled in College Park. Therefore, the court held that the named plaintiffs lacked standing to maintain the action. In addition, because the named plaintiffs were not deemed domiciliaries of the City, they were held to be outside of the class which they purported to represent. The circuit court dismissed the action for lack of standing.

The plaintiffs appealed to the Court

of Special Appeals, and this Court issued a writ of certiorari prior to a decision by the intermediate appellate court. We held that the plaintiffs, as registered voters of the City of College Park, had standing to maintain a suit challenging the City's apportionment. DuBois v. City of College Park, 280 Md. 525, 375 A.2d 1098 (1977). Further, we stated that the City, by moving to dismiss for lack of standing, could not collaterally challenge whether the plaintiffs were properly registered as voters. Instead, we held that any challenge by the City to the plaintiffs' status as registered voters must be made through the procedures prescribed by statute and the City charter for making such challenges. 280 Md. at 529, 533-534, 375 A.2d 1098. The case was remanded to the circuit Court.

After further arguments were held, the circuit court found that, in light of the 1970 census, the deviation between the actual population in each district and the number of persons who would constitute a properly apportioned district, was too large. The court, however, rejected the plaintiffs' claim that all on-campus students should also be included in the City's apportionment base. The circuit court reasoned that, according to the principles set forth by this Court in Bainum v. Kalen, 272 Md. 490, 325 A.2d 392 (1974), an on-campus student was presumed to be a domiciliary of his former place of residence. The court stated that a student could overcome this presumption by registering to vote in College Park, at which time the student must affirm by oath that he intended to remain a City domiciliary.

Therefore, the court held that equal protection principles did not require the inclusion of all on-campus students in the apportionment base because this would encompass transient nonresidents. The court further held that, because some of the students who resided within the University's boundaries had overcome the presumption of nonresidency by registering to vote in the City, the City was required to include in its apportionment base any student in the third or fifth district who had registered to vote. Moreover, the court noted that this inclusion of students who resided in the third and fifth districts, and who had registered to vote, would further increase the existing malapportionment in light of the 1970 census. The court then ordered the City to submit a new apportionment plan, consistent with its opinion, correcting the existing

malapportionment.

The City subsequently submitted a revised apportionment plan which, all parties agreed, conformed to the court's order. A final judgment approving the new plan was entered. The plaintiffs again appealed, and this Court again issued a writ of certiorari prior to a decision by the Court of Special Appeals.

The primary issue on this appeal is whether the approved apportionment plan, which in six districts included all students in the population base, and in two districts apparently included all off-campus students but only those on-campus students who had registered to vote, violates equal protection of the laws.[3] The plaintiffs contend that

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3. The City also has raised two arguments in a motion to

dismiss this appeal. First, it asserts that the plaintiffs failed in the trial court to present sufficient evidence in support of their contention that the revised apportionment plan is unconstitutional. Second, the City argues that the plaintiffs did not exhaust their administrative remedies because they did not oppose the new plan at a public hearing conducted as part of the City Council's adoption of the plan.

Preliminarily, we note that this case is properly within this Court's jurisdiction, and there are no violations of procedural requirements alleged that would warrant dismissal of the appeal. The two grounds urged by the City, even if meritorious, would not be grounds for dismissal.

Of course, an appellate court can affirm a decision of a trial court on any ground adequately shown by the record, even if it was not the ground relied on by the trial court, and even if it was not raised by the parties in the trial court. Robeson v. State, 285 Md. 498, 502, 403 A.2d 122a (1979). If the record were insufficient to show the invalidity of the apportionment plan, or if there were administrative remedies which should have been exhausted, these might be grounds for an affirmance.

Nevertheless, in this case both contentions by the City must fall on their merits. The evidence at the first trial, coupled with the type of new plan mandated by the circuit

the circuit court erred in holding that the City only had to include those on-campus students who had registered to vote instead of the entire on-campus student population. They argue that the inclusion

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court's order and the representations of the City's counsel at the hearing on the new plan, were counsel sufficient to present the equal protection issue raised by the plaintiffs.

With respect to the plaintiffs' asserted failure to exhaust their administrative remedies, the action of the City Council in adopting the revised plan was a legislative action and not a determination by an administrative agency. We are not aware of any principle of law stating that one affected by a legislative enactment may not challenge the validity

of all off-campus students in the apportionment base whether or not they are registered to vote, while requiring that on-campus students must register to vote in order to be included, creates an arbitrary classification.

The general principle governing legislative apportionment is that there "must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen." Reynolds v. Sims, supra, 377 U.S. at 579, 84 S.Ct. at 1390. See also St. Adm. Bd. of Elect. Laws v. Calvert, 272 Md. 659, 327 A.2d 290 (1974), cert. denied, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).[4]

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of that enactment unless he had been present and testified at the legislative hearings.

4. The "one person one vote" principle wasinitially apllied to state legislatures and congressional districts. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed. 2d 481 (1964); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Since then, it has been extended to the election of county and municipal representatives where such governments exercise substantial governmental powers. See, e.g., Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971); Hadley v. Junior College District, 397 U.S. 50 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); Avery v. Midland County, 390 U.S. 474, 38 S.Ct. 1114, 20 L.Ed.2d 45

(1968); Montgomery County v. Garrott 243 Mf. 634, 222 A.2d 164 (1966). According to College Park's charter, Code of the City of College Park, Art. XI (1965), the City does or may exercise substantial governmental authority. Therefore, the apportionment of its councilmanic districts is clearly within the scope of the "one person one vote" principle.

Some differentiation among citizens with respect to the weight of their vote may be permissible it it related to "permissible purposes of legislative apportionment" or effected "a rational state policy," 377 U.S. at 565, 579, 84 S.Ct. 1362. Nevertheless,

> "if, even as a result of a clearly rational state policy . . . population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequatley weighted vote would be unconstitutionally impaired." (Id. at 581, 84 S.Ct. at 1392.)

Moreover, in deciding reapportionment cases like the present one, classifications having the effect of diluting a person's right to vote are subject to

careful scrutiny. This was explained by the Supreme Court in Reynolds v. Sims, supra, 377 U.S. at 561-562, 84 S.Ct. at 1381, as follows:

> "While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, such a case 'touches a sensitive and important area of human rights,' and "involves one of the basic civil rights of man,'

presenting questions of alleged 'invidious discriminations . . . against gourps or types of individuals inviolation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541, 63 S.Ct., at 1113. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and poltical rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

Abate v. Mundt, 403 U.S. 182, 185, 91 S. Ct. 1904, 1906-1907, 29 L.Ed.2d 399 (1971); Kramer v. Union School District, 395 U.S. 621, 626-630, 89 S.Ct. 1886, 1889-1891, 23 L.Ed. 2d 583 (1969); O.C.

Taxpayers v. Ocean City, 280 Md. 585, 594, 375 A.2d 541 (1977).

The City has attempted to justify its exclusion from the apportionment base of on-campus students who have not registered to vote by arguing that these students are transients and are not in fact residents of College Park. The City accordingly argues that to include these non-residents would dilute the weight of the votes of true residents of theCity who would be expected to have a greater interest in municipal affairs. In support of tis argument, the City points to language in Burns v. Richardson, 384 U.S. 73, 91-92, 86 S.Ct. 1286, 1296-1297, 16 L.Ed.2d 376 (1966), where the Supreme Court stated:

> "We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the fed-

eral census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in . . . (the case of Reynolds v. Sims) and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. Indeed, in WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed. 2d 568 decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no diff-

erent from apportionments using a total population measure. Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e. g., Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the resulting appor-

tionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby."

It is clear, however, that the City could not invoke the theory that students are generally transients, in order to deny the right to vote to any student who in fact met the voting qualifications of the City Charter.[5] See Evans v. Cornman,

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5. The voting qualifications are set forth in the City's charter. Code of the City of College Park, Sec. 14 (1965.) They are:

"Except as otherwise provided herein, any person possessed of all the qualifications that are necessary to entitle a person to exercise the right to register as a voter of the State of Maryland, under the

general election laws, shall be a citizen of the United States and at least eighteen (18) years of age on or before election day and shall have his actual residence in the City of College Park, in the sense that he had no other residence elsewhere, for the period of ninety (90) days next preceding a municipal election and shall satisfy the Registering Officer of these facts. Any applicant to register who shall be registered as a voter elsewhere in the State of Maryland shall not be permitted to register unless there is filed with the Registrarion Officer of said city the applicant's following affirmative affidavit under oath:

A. Do you hereby affirm your intent to be a member of the City of College Park community?

B. Are you presently registered to vote in a state other than Maryland, a county other than Prince George's or any other municipality, and if so, will you cancel that registration as soon as practicable after this registration is completed?

C. Are you aware that when you register in the City of College Park, it will thenceforth be presumed that your residence is here for voting purposes and that you will have to overcome that presumption should you later attempt to register in a

state or county or municipality other than Maryland, Prince George's County the City of College Park, respectively, and do you accept this fact? The word 'residence' for these purposes means the affiant's primary residence, the place where he will be registered to vote, where he presently resides, and plans to reside, except for short temporary absences, as for example, a vacation or hospitalization."

398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); Whately v. Clark, 482 F. 2d 1230 (5th Cir. 1973), cert. denied, 415 U.S. 934, 94 S.Ct. 1449, 39 L.Ed,2d 492 (1974). For example, the Supreme Court in Carrington v. Rash, supra, 380 U.S. at 93-96, 85 S.Ct. 775, held that Texas could not constitutionally deny military personnel the right to vote where such military personnel had moved their residence to Texas after their entrance into the military, if those persons otherwise met the state's voter qualification requirements.

Not only is it impermissible to deny the right to vote to students or servicemen who otherwise meet voter qualifications but a city may not dilute the votes persons in a particular district by a

bold assertion that it is populated by a large class of purported transients such as students or servicement. Kirkpatrick v. Preisler, 394 U.S. 526, 534-535, 89 S.Ct. 1225, 1230-1231, 22 L.Ed. 2d 519 (1969); Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609 (1964). See Egan v. Hammond, 502 P. 2d 356 (Alaska 1972); In re Opinion of the Justices, 111 N.H. 146, 276 A.2d 825 (1971); Tp. of Franklin, etc. v. Board of Ed., etc., 74 N.J. 345, 378 A.2d 213, 219 n. 2 (1977), cert. denied, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978); Seaman v. Fedourich, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778, 784 (1965). See also Mahn v. Howell, 410 U.S. 315, 330-332, 93 S.Ct. 979, 988-989, 35 L.Ed. 2d 320 (1973); Groh v. Egan, 526 P. 2d 863, 869-874 (Alaska 1974).

In Davis v. Mann, supra, 377 U.S. at 691, 84 S. Ct. at 1448, the Supreme

Court rejected the

> "appellants' argument that the underrepresentation . . . (in three counties) is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible."

Similarly, in Kirkpatrick v. Preisler, supra, the Supreme Court rejected Missouri's attempt to explain population variances in its Congressional districting because of large numbers of military personnel and college students present within the district. The Court stated (394 U.S. at 534-535, 89 S.Ct. at 1231):

"Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population; overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district correspons to the alleged extraordinary additional numbers of noneligible voters there."

The City of College Park has attempted to justify its assertion that the students are not City residents by pointing to the low number of students who have registered to vote and by statistics supplied by the University indicating that only 900 of the 8,000 on-campus students originally came from Prince George's County. It is questionable whether these facts alone would be sufficient to validly support a conclusion that all students, except those who have registered to vote, are presently transients. However, assuming arguendo that the City could reasonably reach this conclusion, other aspects of the apportionment plan render it unconstitutional.[6]

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6. Even if it could be assumed that voter registration provided sufficient indicia of residency, the use here of the different

apportionment bases of registered voters for one group of persons or districts, and total census population for a different group of persons or districts, might still violate equal protection principles. See Town of Greenburgh v. Board of Supervisors, 53 Misc.2d 88, 277 N.Y.S.2d 885, 895-896 (1967). Although the use of registered voters as an apportionment base seems to be less favored than total or citizen population, see Burns v. Richardson, 384 U.S. 73, 92-93, 86 S. Ct. 1286, 16 L.Ed.2d 376 (1966); Ellis v. Mayor and City Council of Baltimore, 352 F.2d 123 (4th Cir. 1965L; Preisler v. Mayor of City of St. Louis, 303 F. Supp. 1071 (E.D. Mo.1969), it was at least used uni-

In conformance with the circuit court's order to submit a new plan, the City of College Park only excluded students from its apportionment base in the third and fifth districts-the two "student" districts. The students who were excluded were those residing in dormitory facilities who had not registered to vote. The record demonstrates, however, that the City did not attempt either to determine the number of or to exclude those students who had not registered to vote and who resided in the other six districts. For example, the record shows

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formly in all of the districts of the geographic unit in cases which have permitted it to be used. Burns v. Richardson, supra; Martin v. Venables, 401 F.Supp. 611 (D. Conn.1975); Reynolds v. Gallion ex

that the second district contains several fraternity and sorority houses. Students residing in these houses were included in the apportionment base whether or not they had registered to vote. In addition, there is an inference that the City did not exclude those students who lived in private residences or fraternity and sorority houses within the "student districts," i. e., the third and fifth districts.

The concept of equal protection of the laws has traditionally required "the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

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rel. Attorney General of Alabama, 308 f.Supp. 803 (M.D.Ala.1969).

Reynolds v. Sims, supra, 377 U.S. at 565, 84 S.Ct. at 1383. Thus, once a constitutionally permissible apportionment base is chosen, equal protection would generally require that the apportionment base would be applied uniformly to all people and throughout all districts. According to the City's premise that students who have not registered to vote are not domiciliaries, it would seem to follow that all students who are not registered to vote are in the same class and should not be included in the apportionment base, or at least there should likewise be an exclusion of large groups such as those living in the fraternities and sororities in the second district. However, the City of College Park has differentiated among the students by not including in the apportionment base those non-voter

registered students in the third and fifth districts, but including in the base large groups of students in the fraternity and sorority houses in the second district regardless of whether they have registered to vote. Moreover, it ispossible that the City has not even treated large groups of third and fifth district students the same, for there is an inference in the record that the City only excluded unregistered dormitory residents but did not exclude any students living in the fraternities or sororities located in the third district.

The City has offered no explanation for treating significant groups of students differently. In the circumstances of this case, permitting a large number of students who have not registered to vote to be included within the apportionment base while excluding others who are similarly situated, certainly does not

sure that only true domiciliaries will be counted.

In sum, the apportionment plan submitted by the City in accordance with the guidelines laid down by the circuit court, and later approved by the circuit court, contains classifications in the population base whcih cannot be justified when "carefully and meticulously scrutinized" (Reynolds v. Sims, supra, 377 U.S. at 562, 84 S.Ct. 1362). It violates the Equal Protection Clause of the Fourteenth Amendment and Art. 24 of the Maryland Declaration of Rights. See Board v. Goodsell, 284 Md. 279, 293 n. 7, 396 A.2d 1033 (1979).

JUDGMENT REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.

447 A2d 838

Renee DuBOIS et al.

v.

CITY OF COLLEGE PARK et al.

No. 96.

Court of Appeals of Maryland.

July 19, 1982.

ELDRIDGE, Judge.

This case, before us for the third time, is the culmination of a suit initially filed in October 1975 by three University of Maryland students challenging the apportionment of councilmanic districts in the City of College Park, Maryland.

The City of College Park is the site of the University of Maryland's principal campus. With a population of approximately 28,000 persons,[1] the City is divided into eight councilmanic districts, each of which elects a City Councilman. A large portion of the third and fifth districts consists of the University of Maryland campus, and all of the University's student dormitories are located in those two districts. At the inception of this suit, the City had apportioned its voting districts by subtracting from its total federal census population those students who resided on the University campus.

That base was then divided equally into the eight councilmanic districts.

In October 1975 three students, all registered voters of College Park, filed a class action in the Circuit Court for Prince George's County alleging that the apportionment scheme employed by the City violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection principle embodied in Article 24 of the Maryland Declaration of Rights. The plaintiffs claimed that the exclusion of on-campus students from the apportionment base diluted their votes because the third and fifth districts contained two to three times the population of the other six districts. The circuit court dismissed the claim, concluding that the three plaintiffs had no standing to maintain the action because they were not domiciled in College Park and were not properly regitered to vote.

On appeal, in DuBois v. City of College Park, 280 Md. 525, 375 A.2d 1098 (1977) (DuBois I), this Court reversed, deciding that the plaintiffs' status as registered voters of the City gave them standing to challenge the apportionment of the councilmanic districts. We held that a collateral attack upon the plaintiffs' status as registered voters could not be made by raising the issue of standing in a reapportionment case, and that any challenge to the plaintiffs' voter status must be made through the procedures prescribed by statute and the City Charter for making such challenges. 280 Md. at 529, 533-534, 375 A.2d 1098. The case was remanded for a determination of the merits.

Following the remand, the circuit court held that the councilmanic districts were unconstitutionally apportioned. The circuit court went on to approve a new apportionment plan which, in six districts,

was based upon total population and included all students in the apportionment base. However, with respect to the third and fifth councilmanic districts, the new plan included in the population base all off-campus students and all on-campus students who had registered to vote. The new plan excluded from the base all on-campus students in the third and fifth districts who had not registered to vote.

This Court reviewed the constitutionality of the new apportionment plan in DuBois v. City of College Park, 286 Md. 677, 410 A2d 577 (1980) (DuBois II). Because the plan included all students from districts one, two, four, six, seven and eight in the apportionment base, whether they were registered to vote or not, while excluding on-campus students in districts three and five from the base unless they were reistered voters, the Court held that the plan violated the Equal Protection Clause of the Fourteenth

Amendment and Article 24 of the Maryland Declaration of Rights. 286 Md. at 691, 410 A.2d 577. The case was again remanded for further proceedings.

Thereafter, the City Council of College Park adopted a plan to apportion the districts entirely on the basis of registered voters rather than total population. Under this plan the City will eradicate previous voter registration lists and "conduct an entirely new City-wide voter registration drive." Each housing unit in the City is to be advised of the registration drive. In addition, the City will "deputize" a substantial number of persons whose duty it will be to ensure that all registrants are residents of College Park. Within three months after completion of the registration drive the City will be apportioned into eight districts. Districts are to be reapportioned every five years if there is variance of five percent or more in the number

of registered voters between any district and the mathematical average of all districts. To implement this plan the City would amend its Charter and rescind all inconsistent portions of the present Charter. Finally, voting eligibility requirements are not to be changed.

The above-summarized plan was approved by the circuit court after a hearing, and the plaintiffs took an appeal to the Court of Special Appeals, claiming that the plan is unconstitutional. As in DuBois I and DuBois II, we issued a writ of certiorari prior to a hearing in the intermediate appellate court.[2]

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2. The plan described in the text was designated "Plan B" by the City Council. The City Council also adopted an alternative plan, Plan A, which proposed that a census be taken to determine the number of College Park domiciliaries. From

the results of that census, districts would be evenly apportioned. The plan under consideration here, Plan B, was, however, the City's preferred choice as indicated by the following colloquy at oral argument before us:

> "COUNSEL FOR THE CITY: We have submitted the cross-appeal on Plan A in the event that the Court would find Judge Mattingly's ruling on Plan B...
>
> THE COURT: You only want us to... reach your cross-appeal if we reverse on their appeal (challenging Plan B).
>
> COUNSEL FOR THE CITY: That is correct...
>
> THE COURT: So this is really a concession, a stipulation, that the City really wants Plan B.
>
> COUNSEL FOR THE CITY: That's

The plaintiffs' constitutional objection to College Park's plan is that the apportionment is based upon registered voters rather than total federal census population. The plaintiffs, using registered voter figures for the year 1975, claim that persons in councilmanic districts three and five will continue to be underrepresented in light of the 1970 federal census.

The Supreme Court, in Reynold v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964), held that, under the Equal Protection Clause, a state legislature "must be apportioned on a population basis."

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correct."

Thus, because of our decision in this case, we need not and do not consider the constitutionality of Plan A.

While pointing out that some "divergences from a strict population standard" are constitutionally permissible if "based on legitimate considerations incident to the effectuation of a rational state policy," the Court in Reynolds nevertheless held that "the overriding objective must be substantial equality of population among the varous districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579, 84 S.Ct. at 1390. As pointed out by us in DuBois II, 286 Md. at 684, n.4, 410 A.2d 577, the princples set forth in Reynolds v. Sims, and in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), extend to elected local government units exercising substantial governmental authority. See Town of Lockport v. Citizens For Community Action, 430 U.S. 259, 266, n. 11, 97 S.Ct. 1047, 1052, n. 11, 51 L.Ed.2d 313(1977); Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904,

29 L.Ed.2d 399 (1971); Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); Montgomery County v.Garrott, 243 Md. 634, 639, 222 A.2d 164 (1966).

While population is the basis upon which districts must be apportioned, the plaintiffs' argument in this case overlooks the holdings of the Supreme Court that such a population basis is not required to be the federal census figures in all cases. Thus, the use of "citizen" or "domiciliary" population may be permissible rather than total census population. Furthermore, if the use of registered voters as a basis produces a distribution of elected representatives substantially the same as a permissible population basis would produce, registered voters may be used. This was made clear by the Supreme Court in Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

In Burns v. Richardson, the State of

of Hawaii, because of its large transient population, proposed to use registered voters as the basis for apportionment of the state legislature. Those challenging the plan, like the plaintiffs in the case at bar, pointed to "the sizable differences in results produced by . . . distribution (according to registered voters) in contrast to that produced by the distribution according to the State's total population, as measured by the federal census figures." 384 U.S. at 90, 86 S.Ct. at 1295. The Supreme Court responded by holding that the population basis for apportionment under Reynolds v. Sims did not necessarily mean federal census population (Burns, 384 U.S. at 91, 86 S.Ct. at 1296):

> "The holding in Reynolds v. Sims, as we characterized it in the other cases decided on the same day, is

that both houses of a bicameral state legislature must be apportioned substantially on a population basis.' We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in that case and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinc-

tion between the acceptability of such a test and a test based on total population."

In the language just as applicable to College Park with its large transient student population, as to Hawaii with its large transient military population, the Court continued (id. at 92, 86 S.Ct. at 1296):

> "Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured."

The Court in Burns then pointed out that the use of registered voters or actual voters as the basis for apportionment does present some problems (id. at 92-93, 86 S.Ct. at 1296-1297):

> "Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participte in the electoral process, or perpetuate a 'ghost of prior malapportionment.' Moreover, 'fluctuations in the number of registered voters in a given election may be sudden and substantial; caused by such fortuitous factors

as a peculiarly controversial election issue, a particularyly popular candidate, or even weather conditions.' Ellis v. Mayor & City Council of Baltimore, 352 F.2d 123, 130 (C.A. 4th Cir. 1965). Such effects must be particularyly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years."

The Court then held that Hawaii's use of registered voters as the basis for apportionment

"satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population

basis." (id. at 93, 86 S.Ct. at 1297).

The fact that apportionment on a voter registration basis failed to result in the same distribution as apportionment on a federal census population basis was deemed "insufficient to establish constitutional deficiency in light of the large transient military population and large number of tourists who may have been counted in the census figures. Id. at 94-95, 86 S.Ct. at 1297-1298. The Court, reiterating that "it is enough if it appears that the distribution of registered voters approximated distribution of . . . citizens or any other permissible population base" (id. at 95, 86 S.Ct. at 1298), stated that it found no error in the trial court's "conclusion that the apportionment achieved by use of a registered voters basis substanti-

ally approximated that which would have appeared had . . . citizen population been the guide." Id. at 96, 86 S.Ct. at 1298.

Consequently, the teaching of Burns v. Richardson is that voter registration, to be valid as an apportionment base, need not produce the same result as the use of federal census population would produce. Instead, voter registration may be used as an apportionment base if it produces a result not substantially different than that which would be produced by the use of another permissible population base, such as citizen population. See also, Gaffney v. Cummings, 412 U.S. 735, 746-748, 93 S.Ct. 2321, 2328-2329, 37 L.Ed.2d 298 (1973), Ely v. Klahr, 403 U.S. 108, 115, n. 7, 91 S.Ct. 1803, 1807, n. 7, 29 L.Ed.2d 352 (1971); Pate v. El Paso County, Texas, 337 F. Supp. 95 (S.D. Tex.) aff'd 400 U.S. 806,

91 S. Ct. 55, 27 L.Ed.2d 38 (1970); Borough of Bethel Park v. Stans, 319 F. Supp. 971, 977 (W.D.Pa. 1970), aff'd 449 F.2d 575 (3d Cir. 1971); Egan v. Hammond, 502 P.2d 856 (Alaska 1972). Cf., Ellis v. Mayor And City Council of Baltimore, 352 F. 2d 123 (4th Cir. 1965).

Applying these principles to the present case produces a clear result. The plaintiffs have utterly failed to show that the use of voter registration as the apportionment base under College Park's new plan will produce a result substantially different than would be produced under a permissible population base. In fact, no such showing could be made at this time, as under the plan approved by the circuit court the present voter registration lists will be cancelled, and new voter registration lists will compiled following a voter registration drive. After the new

voter registration lists are compiled, the apportionment plan might possibly result in the same distribution among districts as a plan based upon the 1980 federal census. Or the plan based on the new voter registration lists may result in the same distribution among districts as a plan based upon citizen or domiciliary population. College Park's new apportionment plan, which is not yet implemented, does not on its face violate equal protection principles.

JUDGMENT AFFIRMED.

PETITIONERS TO PAY COSTS.

Office - Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-813

RENEE DUBOIS, *et al.* *PETITIONERS*

v.

CITY OF COLLEGE PARK, *et al.* *RESPONDENTS*

On Petition For A Writ Of *Certiorari* To The Court of Appeals Of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's challenge to the constitutionality of College Park's proposed reapportionment plan is non-justiciable for lack of ripeness where the voter registration drive upon which the redistricting is to be based has not yet begun and the resulting registration data is not yet available.

2. Whether College Park's proposed plan to reapportion its councilmanic election districts solely on the basis of voter registration statistics is on its face consistent with the one person-one vote mandate of the Fourteenth Amendment.

3. Whether Petitioner's claim of invidious discrimination is supported by the evidence adduced below.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-813

RENEE DUBOIS, *et al.* *PETITIONERS*

v.

CITY OF COLLEGE PARK, *et al.* *RESPONDENTS*

On Petition For A Writ Of *Certiorari* To The Court Of Appeals Of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, The City of College Park, Maryland, and Miriam Wolf, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at Md. , 447 A.2d 838 (1982) The opinion of the Circuit Court for Prince George's County, Maryland, not reported, is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 19, 1982, affirming the judgment of the Circuit Court for Prince George's County of April 29, 1981. A petition for certiorari was filed by Petitioners on October 18, 1982, within 90 days of the judgment of the Court of Appeals.[1] This Court's jurisdiction was invoked under 28 U.S.C. §1257(3) (1976).

QUESTIONS PRESENTED

1. Whether Petitioner's challenge to the constitutionality of College Park's proposed reapportionment plan is non-justiciable for lack of ripeness where the voter registration drive upon which the redistricting is to be based has not yet begun and the resulting registration data is not yet available.

2. Whether College Park's proposed plan to reapportion its councilmanic election districts solely on the basis of voter registration statistics is on its face consistent with the one person-one vote mandate of the Fourteenth Amendment.

3. Whether Petitioner's claim of invidious discrimination is supported by the evidence adduced below.

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[1]Due to Petitioners' failure to comply with the printing requirements of Supreme Court Rule 39, the Petition was not actually docketed at the time of filing. Petitioners were instructed to resubmit a conforming petition, which they did on or about November 15, 1982, at which time the Petition was docketed. Subsequent thereto, counsel for Respondents contacted Ms. McFarland of the Clerk's Office who advised counsel that the Brief in Opposition would be due thirty (30) days after receipt by counsel of the revised Petition, pursuant to Rule 24. A letter confirming this understanding was sent by Respondents' counsel to the Clerk on November 18, 1982.

STATEMENT OF FACTS

The Court is respectfully referred to the opinion of the Court of Appeals of Maryland in *DuBois v. City of College Park (II)*, 286 Md. 677, 679–681, 410 A.2d 577 (1980). The facts pertinent to the instant appeal are set forth below.

Following the mandate of the Court of Appeals in *Dubois II*, the City Council of College Park ("Council") undertook to develop an apportionment plan for the City's eight councilmanic districts consistent with the criteria set forth in the lower court's opinion. The result of this effort was the promulgation of two substantive proposals adopted by resolution of the Council and labeled respectively as Plan A and Plan B. The text of the resolution is reproduced in the Appendix. According to the Preamble of the resolution, the City intended to devise a plan which would not only comport with the guidelines articulated in *DuBois II*, but would also permit College Park to deduct from its apportionment base: "Those persons Supreme Court decisions have told us may be excluded as being "ineligibles," that is, non-residents...."

Under Plan B the City proposed to pursue a "rigorous active program" of soliciting potential registered voters. The Plan contemplates that a mailing will be sent to each housing unit in the City advising persons of the program. The City intends to "deputize" a substantial number of registrants who will make use of a questionnaire designed to elicit information to ensure that all persons registering are indeed *bona fide* residents of College Park. Within approximately three months after the completion of registration the City will then apportion its territory into eight equal councilmanic districts based upon the number of registered voters in each district. It is contemplated that the City will be reapportioned every five years in the event there is a variance of five percent or more between the number of registered voters in any district and the mathematical average of the registered voter population for all districts.

To implement Plan B the City may formally have to amend its Charter. Needless to say, none of the procedures contemplated by Plan B have yet been carried out, pending resolution of Petitioner's request for review by this Court on certiorari.

The constitutionality of Plan B was fully argued by counsel at a hearing before the Circuit Court for Prince George's County on

January 14, 1981. No additional testimony was heard at that hearing nor was any evidence admitted other than the text of the resolution authorizing the Council to submit Plans A and B for the Circuit Court's review. By Memorandum, Opinion and Order dated April 29, 1981, the Circuit Court expressly approved reapportionment Plan B, but criticized Plan A as an "obnoxious" invasion of privacy.

Thereafter, both sides appealed to the Court of Special Appeals of Maryland: Petitioners from the approval of Plan B and Respondents from the apparent rejection of Plan A. Prior to a hearing in the Court of Special Appeals, the Court of Appeals sua sponte issued a writ of certiorari.

On certiorari in the Court of Appeals, Respondents stipulated during oral argument that the City would abandon Plan A were the court to uphold the constitutionality of Plan B. *DuBois v. City of College Park (III)*, Md. , 447 A.2d 838, 840 n.2 (1982). On July 19, 1982, the Court of Appeals entered judgment upholding the constitutionality of Plan B. Petitioners thereafter sought review in this Court by way of a petition for certiorari.

At the time of the hearing in the Court of Appeals, as well as at the present time, the City had taken no steps to implement Plan B, electing instead to await the outcome of the full appellate process. During the pendency of the Maryland state court appeals, municipal elections for Mayor and Council were held in the fall of 1981 under the pre-existing apportionment plan, which still remains in effect.

1. PETITIONERS' CLAIM THAT THE PROPOSED USE OF VOTER REGISTRATION DATA TO REAPPORTION COLLEGE PARK'S COUNCILMANIC DISTRICTS WILL DEVIATE IMPERMISSIBLY FROM A CONSTITUTIONALLY ACCEPTABLE NORM IS NOT JUSTICIABLE FOR LACK OF RIPENESS.

Petitioners' primary attack on the constitutionality of College Park's Plan B and presumably the decision of the Maryland Court of Appeals upholding the Plan, is that the use of registered voter data such as that contemplated by Plan B, would not "produce substantially the same results as would a proper population base...." [Pet. for Cert. at 14–15.]

In support of their claim of excessive deviation, Petitioners cite statistics compiled by the City of College Park more than seven years ago in 1975 at about the time this litigation was originally commenced. This data, which is reproduced at page 14 of the Petition, shows the disparities that would presumably arise were voter registration data employed to reapportion the City's eight local election districts. The deviations are computed by comparing the 1975 distribution of registered voters among the various districts to the distribution of the total population in each district using 1970 census data.

In mounting their challenge, however, Petitioners have continued to overlook the fact that Plan B has not yet been put into effect. When it is finally implemented (assuming the Petition is denied), the Plan will not permit use of pre-existing voter registration statistics to redraw district lines. Rather, the City will conduct a rigorous and active program designed especially to solicit and enroll *bona fide* residents as registered voters for local elections. Consequently, it is impossible at this juncture to ascertain whether Plan B will produce a distribution of registered voters that will not deviate substantially from a constitutionally valid mean. Petitioner's cries of excessive deviation are, therefore, premature and unripe for adjudication.

The fact that Plan B has yet to be implemented necessarily precludes adjudication of this issue by this Court because of constitutional and prudential constraints on the power of the federal judiciary to entertain and resolve non-justiciable disputes. The practice of this Court has long been to refrain from deciding abstract, hypothetical or contingent questions of constitutional law; nor will the Court decide any constitutional question, except with reference to the particular facts to which it is to be applied. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Liverpool, N.Y. & P.S.S. Co. v. Commissioner*, 113 U.S. 33, 39 (1885). Before this Court may properly exercise the powers conferred upon it by Article III of the Constitution to adjudicate cases or controversies arising out of the state courts, there must first exist concrete legal issues presented in actual cases involving imminently certain interference with the legal rights asserted by the plaintiffs. Hypotheti-

cal or speculative harm is not enough. *United Public Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947). As Mr. Justice Frankfurter stated in *Longshoremen's Union v. Boyd*, *supra*,

> Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

347 U.S. at 224.

To be sure, the distinction between an abstract question and a case or controversy "is not discernible by any precise test." *Babbitt v. Farm Workers*, 442 U.S. 289, 297-298 (1979). Insofar as the constitutional component of the ripeness doctrine is concerned there must be a "live" case or controversy in the sense that the application of an allegedly unconstitutional statute to the plaintiffs is inevitable. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140–142 (1974); *see Buckley v. Valeo*, 424 U.S. 1, 116–117 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); L. Tribe, *American Constitutional Law* §3-13 (1978); Varat, *Variable Justiciability and the Duke Power Case*, 58 Tex. L. Rev. 273, 300–303 (1980).

In the case at bar Petitioners cannot possibly claim to have been harmed by any disparities caused by the implementation of Plan B's voter registration-based system of reapportionment, for the simple reason that Plan B has not yet been activated. Any harm caused to Petitioners' rights by Plan B would be purely conjectural at this stage. There is no conceivable way to ascertain, based on the record now before the Court, whether the use of the to-be accumulated voter registration data will result in an improper deviation from a norm derived from a constitutionally benign population standard. It is, therefore, too early to make anything other than an educated guess as to how Plan B will operate. The adjudication of Petitioners' challenge must await a time when the results of Plan B can be assessed in light of established constitutional doctrine. *Babbitt v. Farm Workers*, *supra*, 442 U.S. at 304.

Like all questions of justiciability, the doctrine of ripeness encompasses a prudential consideration of judicial self-restraint as well as a constitutional limitation on the power of federal courts to adjudicate. *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 81 (1978); *Regional Railroad Reorganization Act Cases*, *supra*, 419 U.S. at 138; *see Poe v. Ullman*, 367 U.S. 497, 502–503 (1961). Viewed as a matter of judicial policy, the ripeness doctrine

calls for the exercise of judicial restraint, notwithstanding the existence of Article III jurisdiction, where the case has not evolved to the point where sufficient facts are available to enable the Court to make an intelligent and informed decision on the issues raised. *United Public Workers v. Mitchell, supra; Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947). Thus, in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), this Court held that an equal protection clause challenge to Ohio's requirement that non-major political parties execute a loyalty affidavit as a condition precedent to obtaining a position on the primary or general election ballot was unripe, where the plaintiffs had failed to allege any facts or adduce any evidence that the loyalty oath provision had restricted their access to the ballot. In the Court's opinion "[p]roblems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise" of jurisdiction, even where the plaintiffs may satisfy the technical requirements of standing and even though they may be parties to a case or controversy. *Id.* at 588.

Similary, in the case at hand, Petitioners' have "jumped the gun" by asking this Court to strike down Plan B as unconstitutional before it has even gone into effect. Unless the Court is prepared to rule that the use of voter registration data to draw election district boundaries is *per se* unconstitutional (a result which would necessarily presuppose the overruling of *Burns v. Richardson*, 384 U.S. 73 (1966)), prudence dictates that the final determination of Plan B's constitutional sufficiency await such time as the results of its implementation can be properly evaluated.

Consequently, for reasons of justiciability alone, review by this Court on certiorari would, at this stage of the controversy, be inappropriate.

2. THE JUDGMENT OF THE COURT OF APPEALS THAT COLLEGE PARK'S VOTER REGISTRATION-BASED REAPPORTIONMENT PLAN IS NOT PER SE UNCONSTITUTIONAL COMPORTS FULLY WITH PRIOR DECISIONS OF THIS COURT AND THE PREVAILING WEIGHT OF AUTHORITY AROUND THE COUNTRY.

In view of the fact that Plan B has yet to be implemented, the sole issue before the Court of Appeals as well as this Court was and is whether the City's selection of a registered voter basis for reapportioning its eight councilmanic districts is *per se* violative of

the one person-one vote principal implicit in the Equal Protection Clause of the Fourteenth Amendment. Save for its application to student populations, the decision of the Court of Appeals is wholly unremarkable within the context of Fourteenth Amendment jurisprudence. Indeed, the Maryland Court of Appeals did nothing more and nothing less than hold that the use of a registered voter standard to effectuate the reapportionment of a legislative body is not prohibited *per se* by the equal protection guarantee. The identical issue was disposed of in similar fashion some 16 years earlier by this Court in *Burns v. Richardson*, 384 U.S. 73 (1966) with regard to the reapportionment of the Hawaii state legislature.

The constitutional office of the courts in reviewing state and local reapportionment cases under the one person-one vote doctrine of the equal protection clause is to determine whether the legislature has made an "honest and good faith effort to construct districts...as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). For purposes of the nondilution principle, total population statistics derived from the federal decennial census are not the exclusive criteria permitted by the Constitution for use as the basis for redistricting. Indeed, as this Court's decisions in *Burns v. Richardson, supra,* and *Mahan v. Howell*, 410 U.S. 315 (1973), illustrate the use of total population census data in certain areas may well do violence to the one person-one vote principle, thereby necessitating resort to alternative data (such as voter registration statistics) to ensure compliance with the Fourteenth Amendment.

This Court specifically addressed the constitutional propriety of a registered voter basis for reapportionment in *Burns v. Richardson, supra*. Mindful of the risks associated with the use of voter registration statistics for redistricting purposes, the Court nevertheless made it clear that voter registration was an appropriate standard where it produces a "distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93.

In approving the use of a registered voter standard for Hawaii, this Court emphasized Hawaii's "special population problems" attributable to the presence of unusually large numbers of military personnel and tourists who were concentrated in one of the state's

western legislative districts. Under these unique demographic circumstances, the use of total population data would have precipitated "grossly absurd and disasterous results." *Id.* at 94. Had the federal census figures been used to apportion the state legislature under such conditions, the "permanent residents" living in districts including military bases might have [had] substantially greater voting power than the electors of districts not including such bases." *Id.* at 94 n.24.

The teaching of *Burns* is that in those jurisdictions, like the City of College Park, that have large non-resident or transient populations, the use of census population statistics might itself contravene the Equal Protection Clause with respect to persons residing in districts having few members of the non-resident class. In these situations, the Constitution not only permits, but may indeed command, the use of an alternative population index. The court below went no further than did this Court in *Burns v. Richardson* in holding that College Park's use of a registered voter basis for reapportionment was not absolutely prohibited in view of the special population circumstances prevailing in the municipality.[2]

The holding of the Court of Appeals below is in line with a host of federal and state court decisions handed down in the wake of *Burns v. Richardson*, which have either upheld or signalled approval of reapportionment plans based upon voter registration data rather than total population statistics. *E.g., Reynolds v. Gallion ex rel. Attorney General*, 308 F. Supp. 803, 805 (M.D. Ala. 1969); *Bowden v. Stacey*, 309 F. Supp. 510, 513 (S.D. Ala. 1970); *Kapral v. Jepson*, 271 F. Supp. 74, 85 (D. Conn. 1967); *Burns v. Gill*, 316 F. Supp. 1285 (D. Haw. 1970); *Pate v. El Paso County*, 337 F. Supp. 95 (W.D. Tex.), *aff'd*, 400 U.S. 806 (1970); *Egan v. Hammond*, 502 P.2d 856, 870 (Alas. 1972); *Hartman v. City & County of Denver*, 185 Colo. 565, 440 P.2d 778, 782 (1968); *Moore v. City of Pacific*, 534 S.W. 2d 486, 504 (Mo. App. 1976).

Worthy of special mention in this connection is the decision of Judge (now Circuit Judge) Newman in *Martin v. Venables*, 401 F. Supp. 611 (D. Conn. 1975) which approved the use of a registered

[2]Using the 1970 census statistics, the "on-campus" student population was alone roughly one-third of the City's total population.

voter base for municipal legislative reapportionment in rather dramatic terms.

> As a matter of democratic theory, it may well be argued that each representative ought to represent the same number of people, without regard to whether the people have voted, have registered, or are even eligible to register. Any and every state and community is free to apportion according to that principle. But the Fourteenth Amendment, as construed in *Burns*, plainly does not mandate this political theory. It requires only that no person have the weight of his vote diminished by permitting the votes of others in another district to acquire added weight. When districts include substantially equal members of registered voters, it is difficult to see how the weight of anyone's vote has been diminished in a constitutional sense. Those who fail to register and thereby forego added representation have no valid complaint against the apportionment; they have the opportunity to register, at least where...there has been no claim of racial discrimination or other improper factor inhibiting registration.

Id. at 616–617.

With few exceptions, those post-*Burns* decisions which have explicitly disapproved the use of voter registration data typically involved jurisdictions having a history of racial discrimination which produced voter registration disparities that would have amplified apportionment disparities had a registered voter standard of redistricting been utilized. *E.g., Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir. 1978), *cert. denied sub nom. East Carroll Parish Police Jury v. Marshall*, 442 U.S. 909 (1979); *Wyche v. Madison Parish Policy Jury*, 635 F.2d 1151, 1162 (5th Cir. 1981); *Cohen v. Maloney*, 410 F. Supp. 1147, 1152 n.9 (D. Del. 1976); *Broadhead v. Ezell*, 348 F. Supp. 1244, 1251–1252 (E.D. Ala. 1972).[3]

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[3]A minority of courts have read *Burns* so restrictively as to foreclose the use of voter registration under most circumstances. *E.g., Preisler v. Mayor of City of St. Louis*, 303 F. Supp. 1071, 1074 (E.D. Mo. 1969); *In re Opinion of the Justices*, 353 Mass. 790, 230 N.E. 2d 801 (1967); *In re Township of Penn Hills*, 216 Pa. Super. 327, 264 A.2nd 429, 431 (1970); *see Calderon V. City of Los Angeles*, 4 Cal. 3d 351, 93 Cal. Rptr. 361, 481 P.2d 481 (1971) (en banc).

As the foregoing discussion has shown, *Burns v. Richardson* and the overwhelming majority of the lower court cases interpreting it unquestionably permit the use of voter registration data as the basis for reapportionment of municipal legislatures. The Court of Appeals of Maryland in upholding the facial validity of College Park's proposed voter registration based reapportionment went no further than did either this Court in *Burns* or those lower courts that have ruled favorably on the issue. The decision of the court below therefore comports completely with the precedents of this tribunal and with the prevailing weight of authority around the country.

As a result, the issuance of a writ of certiorari is unnecessary to resolve a conflict of decisions among the state or federal courts on any point of constitutional jurisprudence. *See Lego v. Twomey*, 404 U.S. 477, 479 n.1 (1972); *Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976); *MacGregor v. Westinghouse Company*, 329 U.S. 402 (1947). Moreover, since the ruling of the Maryland Court of Appeals is fully consistent with the holding in *Burns*, certiorari is not called for to correct a direct conflict in decisions of the Maryland courts and those of this Court. *See Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Pittsburgh v. Alco Packing Corp.*, 417 U.S. 369, 371-372 (1974).

3. THE DECISION BELOW RAISES NO NOVEL OR SIGNIFICANT ISSUES OF EQUAL APPORTIONMENT LAW OR CONSTITUTIONAL DOCTRINE

The issue addressed by the Court below, while important to the litigants at bar, does not touch upon matters of national concern or overriding national importance. As was noted above, the constitutionality *vel non* of voter registration-based reapportionment has been addressed by this Court on at least one prior occasion. *Burns v. Richardson, supra.* The present litigation is of interest only to the extent that it applies these same principles to nonresident student population in college towns. Thus, but for the demographic complexion of this case, it is virtually indistinguishable on a constitutional plane from *Burns*. Therefore, unless this Court feels compelled to modify or retreat from its holding in *Burns*, there is simply no reason to grant certiorari in the instant case. *See Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974).

4.THE PETITIONERS' CLAIM THAT PLAN B WAS TAINTED BY A PATTERN OF INVIDIOUS DISCRIMINATION AGAINST COLLEGE PARK'S STUDENT POPULATION RAISES A PURELY FACTUAL QUESTION WHICH IS NEITHER SUPPORTED BY THE RECORD NOR WORTHY OF REVIEW ON CERTIORARI.

Petitioners advance the alternative argument that Plan B is invalid for the reason that it is "designed to or operates to minimize or cancel out the voting strenth" of a political element of the population, namely, the University of Maryland student body. [Pet. for Cert. at 15.] In support of this contention, Petitioners make much of the minutes of a City Council meeting held in 1967, eight years before the present litigation was commenced. In addition, Petitioners call attention to the fact that the City has developed several reapportionment plans, all designed to exclude all or part of the non-resident student population. This pattern of activity, say Petitioners, evidences a discriminatory intent on the part of College Park that serves to taint the validity of Plan B, even though the latter proposal, as Petitioners unabashedly concede, is "neither designed nor intended to operate to dilute the voting power of non-campus students..." [Pet. for Cert. at 15][4]

The short answer to this assertion is that Petitioners have conceded the very issue they seek to raise here. As they had to acknowledge below, Plan B was not enacted with any intention of "fencing out" students *qua* students or any other "political element" of the voting population. Throughout the history of this litigation, College Park has sought to devise a constitutionally sound method of protecting *bona fide* residents against the dilution of their vote by a huge block of admittedly *non-resident* students and others who have absolutely no connection with a municipality other than the fact they attend school there for part of the year.

The "fencing out" which Petitioners so vociferously decry is nothing more than an attempt by a local government to distribute political power equitably and fairly among those elements of the

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[4]*See City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (holding that proof of discriminatory intent, but not effect, may render an otherwise benign at-large municipal election system invalid for violation of one person-one vote rule.)

population who actually comprise the political community. Seen in this light, College Park has acted no differently than did Hawaii in *Burns* in regard to the unusually large non-resident military and tourist population in that state.

Moreover, considering the relatively small size of the resident population vis-a-vis the non-resident student contingent, the ability to exclude true non-residents from the population base (as determined from the voter registration rolls) is fundamental to the preservation of the political identity of the community. In other words, were College Park obligated to include all non-resident students in its apportionment base, it may very well result in the *de facto* destruction of the subdivision as a distinct political entity. As this Court has itself recognized, "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community and therefore could withstand close constitutional scrutiny." *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972); *see Pope v. Williams*, 193 U.S. 621 (1904).

The Fourteenth Amendment, as construed by this Court, plainly permits state and local governments to exclude non-residents from the apportionment base. *Burns v. Richardson, supra*, 384 U.S. at 92. Moreover, as this Court has stated, insofar as local government reapportionment is concerned, the Constitution does not require a "uniform strait jacket, binding citizens in devising mechanisms of local government suitable for local needs and efficient in solving legal problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1968). *See generally*, Dodge and McCauley, *Reappointment: A Survey of the Practicality of Voting Equality*, 43 U. Pitt. L. Rev. 527, 565-567 (1982). That a local legislature may have failed accurately to forecast the jurisprudential evolution of the one person-one vote principle in sculpting its past reapportionment proposals, so as to ensure that councilmanic district contain roughly equal numbers of *bona fide residents* cannot and should not be misread as invidious discrimination.

Not only have the Petitioners conceded the issue of invidious discrimination by admitting that no such animus prompted the adoption of Plan B, but the record below simply does not lend support to Petitioners' contention. Thus, even if the City had intended to discriminate against the students *qua* students (which,

of course, it did not), Petitioners have failed to muster any probative evidence to demonstrate such an intent. Given the purely factual character of this argument, review by this Court on certiorari is hardly appropriate.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Circuit Court for Prince George's County, Maryland

LAW NO. 61,664

RENEE DUBOIS, *et al*, *PLAINTIFFS*

v.

CITY OF COLLEGE PARK, *et al*, *DEFENDANTS*

MEMORANDUM OPINION AND ORDER

Once again this Court is called upon to pass judgment over the constitutionality of the proposed reapportionment of the City of College Park. The previous plan submitted by the City, in accordance with this Court's Memorandum Opinion and Order of November 15, 1977, provided for the reapportionment base to be determined by counting only registered voters from those districts heavily populated by students, and counting the remainder of the population by federal census data. The Court of Appeals, per Judge Eldridge, held this scheme unconstitutional as being violative of the Equal Protection Clause of the Fourteenth Amendment, and Article 24 of the Maryland Declaration of Rights in *DuBois v. City of College Park*, 286 Md. 677, 410 A.2d 577 (1980). More specifically, the Court ruled that by using different standards to count students in different districts, the City was impermissibly creating a classification for which it could not provide sufficient justification.

Enlightened by the wisdom in Judge Eldridge's opinion, the City of College Park proposed two alternative methods of determining an apportionment base when this matter was heard on January 14, 1981. Both plans provide for uniform application, presumably overcoming the difficulties expressed by the Court of Appeals with the previous plan.

Plan A, as submitted by the City, calls for the apportionment base to be determined on the basis of a census, conducted by mail, which would seek to determine the true domicilliaries of College Park. The census would be in the form of a questionnaire, mailed to all addresses in the city. Failure to respond to the questionnaire,

or an incorrect response, would result in penalties up to five hundred dollars or possible imprisonment.

The alternative method proposed by the City, named Plan B, is merely to determine the apportionment base from a list of registered voters, after an "intense" voter registration drive. The City would then reapportion into mathematically equal districts based on the number of registered voters.

The City contends that either plan would effectuate the City's legitimate interest in screening out transients and non-residents without discriminating against any group or political entity. The City further argues that neither plan is intended to discriminate against any group or political entity. The City further argues that neither plan is intended to discriminate against or exclude students who consider themselves residents of College Park.

The Plaintiffs, present or perhaps former on-campus resident students at the University of Maryland, argue that both plans violate the spirit as well as the letter of Judge Eldridge's opinion in that both are designed to exclude resident students from being represented in city government. The Plaintiffs contend that the questions asked in the census proposed in Plan A are unduly intrusive, and that the voter registration base that is Plan B is violative of the Equal Protection clause of the Fourteenth Amendment. The Plaintiffs contend that the only constitutionally permissible method of reapportionment would be to use federal census data as the only base. It is within the context of these arguments that the Court must resolve the issues before it.

The Court must begin its discussion of these two plans by noting that apportionment is essentially a legislative and political process, and should not be subject to judicial interference. *Burns v. Richardson*, 384 U.S. 73, 16 L. Ed. 2d 376, 86 S.Ct. 1286 (1966).

However, with respect to Plan A, this Court finds itself in agreement with Plaintiffs. The questions appearing on the census form are both intrusive and obnoxious. It is probable that a great many residents of College Park, transient or not, will choose to inform the City of the specifics of their living arrangements. Nevertheless, this Court need not make a determination as to the constitutionality of Plan A, for it will hold that Plan B, utilizing voter registration lists, is a constitutionally permissible basis for reapportionment.

The Court's discussion of Plan B will be somewhat more involved, for the Court above has provided the City with no guidance on the critical issue of the constitutionality of voter registration lists as an apportionment base.

It is important to establish initially that in Maryland, a student who is merely present on a college campus for the purpose of pursuing a course of study does not indicate an intention to abandon his former residence or to acquire a new residence, absent or otherwise. *Shaeffer v. Gilbert*, 73 Md. 66, 20 A. 434 (1980); *Bainum v. Kalen*, 272 Md. 440, 325 A.2d 392 (1974). Thus, on-campus students are presumed by Maryland law not to be residents of the College Park community, but are in fact, considered to be transients or temporary residents.

Moreover, this Court is unable to locate any decision of either the Court of Appeals or the Supreme Court which requires a state to count the entire population as the only acceptable base for apportionment. Indeed, the Supreme Court has recognized a state's legitimate interest in not counting transients and short term residents. A lengthy quotation from *Burns v. Richardson, supra*, serves to illustrate the point:

> We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the bases of comparison in that case and most of the others decided over discussion carefully left open the question what population was being referred to...Neither in *Reynolds v. Sims* nor in any other decision has this court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. 384 U.S. at 91, 16 L. Ed. 2d 490

Although the 14th Amendment does not require apportionment to be based on total population, it does require that one man's vote be worth the same as another's. *Wesberry v. Sanders*, 376

U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526; *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362. Indeed, the Court in *Reynolds* ruled that the "overriding objective must be substantial equality of population among the various districts, so that the *vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" 377 U.S. at 579, 12 L. Ed. 2d at 537 (emphasis added).

The Court left as an open question which consideration was more important, equal units of population, or equal weight of each vote. That ambiguity has never been satisfactorily resolved. In *Burns v. Richardson, supra*, the Court held voter registration to be a permissible basis for apportionment, apparently because of a lower court finding that a result based on census figures would not be substantially different. Yet later in *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), the Court expressed disfavor with the census as a base for apportionment. Noting that the weight of a person's vote is the important factor, the Court stated that the census

> ...is more of an event than a process. It measures population at only a single instant in time. The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially...And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, non-resident military personnel, non-resident students, for example.

The facts in the case at bar provide an excellent example of the above principle. Should the apportionment base be comprised of the total population as the Plaintiffs wish, the votes of those residents of districts without a large percentage of non-resident students would be considerably diluted. As this Court noted in its previous opinion, the result would be that those districts containing the University itself would thus elect half of the council with less than 27% of all registered voters. Such a ludicrous result was contemplated neither by *Reynolds v. Sims, supra*, nor by the Equal Protection Clause.

It was the reasoning of the Supreme Court in *Gaffney* that was adopted by the U.S. District Court in Connecticut to approve voter registration lists as a Constitutionally permissible basis for

apportionment in *Martin v. Venables*, 401 F. Supp. 611 (1975). In so holding that court stated that the Fourteenth Amendment does not require that each representative represent approximately the same number of people, without regard to whether those people have voted, have registered, or are even eligible to register; it requires only that no person have the weight of his vote diminished by permitting the votes of others in another district to acquire added weight. The Court added that practical considerations such as more current data and ease of drawing district lines further contributed to the advantage of voter census data.

Similar reasoning was employed by the U.S. District Court in Alabama in the case of *Reynolds v. Gallian* ex rel. *Attorney General of Alabama*, 380 F. Supp. 803 (M.D. Ala 1969), where voter registration lists were also approved to form an apportionment base.

Plan B as submitted by the City of College Park adheres to the constitutional standard of equal weight for equal votes, while at the same time effectuates the City's legitimate interest in excluding transients. Voter registration as a means of apportionment is free from arbitrariness and discrimination, and would have the uniform application called for by the Court of Appeals. This Court is aware of how well voter registration lists have performed as a basis for selecting jurors; it is confident that these lists will be equally effective in providing a fair and complete apportionment base.

Accordingly, it is this 24th day of April, 1981, ORDERED that Reapportionment Plan B as adopted by the City Council of College Park be, and the same is hereby RATIFIED. The implementation of this plan, however, will be stayed pending appeal.

/S/

Judge

Copies mailed by the Court to:
MORRIS TOPF, *Esquire*
KENNETH A. LECHTER, *Esquire*
BY /S/

Secretary Date

In the Circuit Court for Prince George's County, Maryland

LAW NO. 61,664

RENEE DUBOIS, *et al*, *PLAINTIFFS*

v.

CITY OF COLLEGE PARK, *et al*, *DEFENDANTS*

TRANSMITTAL OF AMENDED REAPPORTIONMENT PLAN

Comes now the City of College Park, by its attorney, Morris Topf, and transmits to this Honorable Court its amended reapportionment plan, attached hereto, which provides for a census to be taken by mail.

WHEREFORE, the Defendant prays that this Honorable Court:

1. Approve either plan A or plan B, along with such declarative relief as may be necessary.

2. Schedule this matter to be heard in open court.

And for such further and other relief as this Court may seem fair and just. /S/ MORRIS TOPF

MORRIS TOPF,
Attorney for Defendant
6505 Belcrest Road, Suite 8
Hyattsville, Maryland 20782
(301) 277-1111

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 1981, a copy of the aforegoing Transmittal of Amended Reapportionment Plan was mailed, postage prepaid, to Kenneth A. Lechter, Esq., 4415 Old Branch Avenue, Marlow Heights, Maryland 20031, Attorney for Plaintiffs. /S/ MORRIS TOPF

MORRIS TOPF

DRAFT 4

RESOLUTION

WHEREAS, the Honorable Judge Eldridge of the Maryland Court of Appeals found the apportionment plan submitted by the City of College Park, in Law #61664 invalid because it treated students living in the dormitory facilities on campus different from the manner in which students living elsewhere in the City were treated, and

WHEREAS, to eliminate this invalidity simply by excluding off-campus non-resident students would still leave the City vulnerable to attack for not treating off-campus non-resident students the same as off-campus non-resident non-students, and

WHEREAS, the City wishes to submit an apportionment plan to the Court for approval which is consistent with Constitutional guidelines, including the requirement of the City to exclude from the apportionment base those persons Supreme Court decisions have told us may be excluded as being "ineligibles," that is, non-residents, and

WHEREAS, by prior resolution of this Council the City Attorney was authorized to submit alternative re-apportionment plans A and B, and

WHEREAS, it has now come to the attention of the Council that the estimated cost of implementing Plan A in its present form is $50,000.00,

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council that the City Attorney is hereby authorized to submit the following revised Plan A and Plan B to the Court:

The City of College Park proposes two alternative apportionment plans, to be designated Plan A and Plan B. Plan A is an apportionment plan based upon a population census conducted by the City of College Park, by mail. In conducting the census, the City will send a census form to each postal address in the City, including group housing, apartments, dormitories, fraternities and sororities. The census form shall be essentially as shown attached hereto. The purpose of the census is to make sure that only those

persons who are bona fide residents of the City of College Park are counted in the apportionment base. The word "residence" for these purposes means the affiant's primary residence, where he presently resides and plans to reside, except for short, temporary absences as, for example, a vacation or hospitalization. The questionnaire to be used will require signature under oath subject to penalty of five hundred dollar fine and/or 90 day imprisonment, in accordance with Section 3 of Article 23A of the Annotated Code of Maryland, that is, refusal to answer the census taker's questions or an untruthful answer, shall subject the person to the fine and penalty mentioned in Section 3 of Article 23A of the Annotated Code of Maryland.

A negative answer, or failure to answer, to questions 5, 6, 7 or 8 will render that person a non-resident. Children shall be included as residents if the parent or guardian with whom they reside is considered a resident.

Once this census is completed, the Council will then divide the City into eight mathematically equal Councilmanic districts, making use of the gathered census data (excluding the non-residents).

The foregoing procedure, under apportionment Plan A, may be subject to possible constitutional attack on the City's authority to conduct such a census imposing the proposed penalties for failure to truthfully answer the form or violation of the confidentiality of information on it. For this reason should the Court declare that the City is without authority to conduct the prescribed census with its criminal sanctions, the City proposes the alternative below Plan B, as below:

Plan B is a plan based upon a rigorous, active program of solicitation on the part of the City of potential registered voters. A mailing will be sent to each housing unit in the City, advising persons of the program. The City will deputize a number of registrants to take registration using the same questionnaire as in Plan A so as to insure that persons registering are bona fide residents of the City of College Park. In other words, the same registration form as the City has been using for the past number of years will be used. Based upon the active program of solicitation of registration,

within approximately three months after completion of registration, the City shall then apportion the City into eight equal councilmanic districts based upon the registered voters. The City will reapportion itself every five years, in the event that there is a variance of 5% or more in registered voters between any district and the mathematical average of all districts. The ninety day residency requirement of Section 14 of the Charter will remain in effect.

In line with either of the plans above, the College Park Charter will be amended and all portions of the present charter inconsistent with the changes will be rescinded. Any resident of the City may challenge the determination of residency of any person under Plan A or Plan B, and the City shall promulgate reasonable rules and regulations for such challenge.

The foregoing changes are subject to ratification by the Court.

PLAN A

COLLEGE PARK CENSUS FORM

You are hereby advised that the following questions require your answer under oath. Refusal to complete the below requested information or an untruthful answer, will subject the person to a maximum fine of $500 and/or ninety (90) days imprisonment pursuant to the provisions of Article 23a, Section 3 of the Annotated Code of Maryland:

1. Name:

2. Age:

3. Address: _____

_____ Apt. or Room # _____

4. List the name, age and family relationship to you of each person related to you by blood or marriage living at your above address. Kindly note that this information is confidential and wrongful disclosure of such information will subject the violator to the same fine and imprisonment as noted above. If there is any person living at this address not related to you by blood or marriage, see note #1 below in order to secure additional census forms.

	Name	*Age*	*Blood or Marital Relationship*
a.			
b.			
c.			
d.			
e.			
f.			

5. Is College Park your primary residence, that is, where you presently reside and plan to reside, except for short, temporary absences (as, for example, a vacation of hospitalization)?

☐ YES ☐ NO

6. If you are presently registered to vote in a state other than Maryland, county other than Prince George's or any municipality

other than College Park, will you promptly take steps to cancel such registration?

☐ YES ☐ NO

7. If you are required to file a state income tax return, will you list College Park as your residence?

☐ YES ☐ NO

8. If you register to vote in the City of College Park, it will thenceforth be presumed that College Park is your residence for voting purposes and you may have to overcome that presumption should you later attempt to register in a state, county or municipality other than Maryland, Prince George's County, or the City of College Park, respectively, and do you accept this fact?

☐ YES ☐ NO

_____ _____

Date Name

NOTE #1: If there are one or more persons living with you at your above address unrelated to you by blood or marriage, kindly indicate the number at the end of this note so that the City may send additional forms. NUMBER _____